

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OFFSHORE-INLAND SERVICES OF
ALABAMA, INC.,

Plaintiff,

v.

R/V DEEPOCEAN QUEST (ex NADIR), IMO
No. 7347823, *in rem*, OCEAN SERVICES, LLC,
in personam, and CASEMO INTERNATIONAL,
S.A.,

Defendants.

CASE NO. C06-0183-JCC
Consolidated with C06-1114-JCC

IN ADMIRALTY

ORDER

DEEP OCEAN QUEST, S.A., a foreign
corporation,

Plaintiff,

v.

STABBERT MARITIME YACHT & SHIP,
LLC, a Washington limited liability company d/b/a
Stabbert Maritime Yacht & Ship, Inc.; SMY&S,
INC., a Washington corporation d/b/a Venture
Pacific Marine Inc.; OCEAN SERVICES, LLC, a
Washington limited liability company;
STABBERT MARITIME HOLDINGS, LLC, a
Washington limited liability company;
STABBERT MARITIME, LLC, a Washington
limited liability company; STABBERT YACHT
AND SHIP, LLC, a Washington limited liability
company; STABBERT YACHT AND SHIP
HOLDING, LLC, a Washington limited liability
company; and DAN STABBERT and his marital
community d/b/a Stabbert Maritime Yacht &
Ship, Inc.,

Defendants.

1 This matter comes before the Court on a Motion for Partial Summary Judgment by Stabbert
2 Maritime Yacht & Ship, Inc. and Stabbert Maritime Yacht & Ship, LLC and SMY&S, Inc. and for
3 Summary Judgment by Remaining Defendants (Def.'s Mot. (Dkt. No. 41)). The Court has considered all
4 of the papers submitted regarding this motion and determined that oral argument is not necessary. The
5 Court hereby GRANTS IN PART and DENIES IN PART the motion and rules as follows.

6 **I. Background and Facts**

7 Plaintiff Deep Ocean Quest, S.A. ("DOQ") is a Panamanian company that owns a marine research
8 vessel ("the Vessel") (Pl.'s Am. Compl. ¶¶ 2.1, 3.1 (Dkt. No. 6 at 2–3).) Plaintiff and only one of the
9 seven affiliated Defendant companies named in this lawsuit, Stabbert Maritime Yacht & Ship, Inc. (now
10 re-named SMY&S, Inc.), entered a contract on January 1, 2005, for the management and
11 repair/refurbishment of the Vessel. The contract, and alleged breaches thereof, are at the heart of this
12 dispute.

13 The written contract is composed of two agreements. One agreement concerns primarily repair
14 and refurbishment of the Vessel (the "VRR" (Dkt. No. 43 at 37–42)) and the other concerns primarily
15 management of the Vessel (the "VMA" (Dkt. No. 43 at 27–34)). The VRR contains an "Integration
16 and Modification" clause stating that the VRR "is a part of and incorporated into" the VMA. (VRR ¶
17 14 (Dkt. No. 43 at 41).) It also states that the contract "shall not be modified except through a writing
18 signed by both parties." (*Id.*) The contract (both the VMA and VRR) was modified in writing once, on
19 January 25, 2005. (Def.'s Mot. 2–3 (Dkt. No. 41).)

20 Pursuant to the contract, Dan Stabbert, as President of Stabbert Maritime Yacht & Ship, Inc. (the
21 company being "Manager" under the contract), arranged for the relocation of the Vessel from France to
22 Gulfport, Mississippi. (Stabbert Am. Decl. ¶ 5 (Dkt. No. 43 at 5).) Stabbert also assisted Plaintiff in
23 forming DeepOcean, LLC, a Mississippi company (with Plaintiff as its sole member) with whom vendors
24 could contract. (*Id.*) Stabbert proceeded to oversee the repair/refurbishment work performed both by
25 vendors and Stabbert-company employees (though Stabbert argues that very little of the work was done

1 by Stabbert-company employees). (*Id.*)

2 In August 2005, Hurricane Katrina damaged the Vessel. (Stabbert Am. Decl. ¶ 6 (Dkt. No. 43 at
3 5–6).) The Vessel was subsequently towed to Seattle, where Stabbert Maritime Yacht & Ship, Inc.
4 continued to manage the repair/refurbishment, including hurricane repairs. (*Id.*) On January 1, 2006, Dan
5 Stabbert purported to assign the contract to another of his companies, Stabbert Maritime Yacht & Ship,
6 LLC. (Assignment (Dkt. No. 43 at 80).) In April 2006, the parties mutually terminated the contract
7 before refurbishment was complete. (Letter of Understanding Regarding Termination (Dkt. No. 43 at
8 82).) Plaintiff filed suit against all seven Defendant companies as well as Dan Stabbert and his marital
9 community, arguing in large part that much of the repair and refurbishment work that was performed on
10 the Vessel was defective. (Pl.’s Am. Compl. (Dkt. No. 6).)

11 Specifically, Plaintiff brings breach of contract, breach of warranty, accounting, and negligence
12 claims, and seeks specific performance and damages. (*Id.*) Three of the Defendant companies (the three
13 that might be considered signatories or assignees of the written contract: Stabbert Maritime Yacht &
14 Ship, Inc.; SMY&S, Inc.; and Stabbert Maritime Yacht & Ship, LLC) now argue that they are entitled to
15 summary judgment on the breach of contract, breach of warranty, and negligence claims, as well as any
16 potential consequential damages claims. (Def.’s Mot. 2 (Dkt. No. 41).) The remaining Defendants argue
17 that as non-parties to the contract, they are entitled to summary judgment as to all claims. (*Id.*)

18 Plaintiff counters, *inter alia*, that the contract is void as incomplete and ambiguous, thus
19 preventing Defendants from shielding themselves with the contract’s express warranty limitations and
20 other contract-based defenses. (Pl.’s Resp. 10 (Dkt. No. 45).) Plaintiff also argues that the non-signatory
21 Defendants should not be dismissed on summary judgment because the corporate veil-piercing standard
22 has been met and all Defendants should be considered alter egos of Stabbert Maritime Yacht & Ship, Inc.
23 and held potentially liable for the defective repairs and other alleged breaches. (*Id.* at 23.)

24 **II. Applicable Standard**

25 Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). “A ‘material’ fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). A party opposing a properly supported motion for summary judgment may not rest on the mere allegations of its pleading, but must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The nonmoving party must provide more than a “mere scintilla” of evidence to show a genuine issue of material fact. *Anderson*, 477 U.S. at 252. Further, it is within the court’s discretion to strike any portion of an affidavit that a party has submitted in support of its pleading if it is not made on personal knowledge or does not set forth facts that would be admissible in evidence. FED. R. CIV. P. 56(e).

III. Choice of Law

Pursuant to the express terms of both the VMA and the VRRRA, the resolution of the contractual dispute “shall be governed by the general maritime law of the United States, or by the laws of the State of Washington in the event there is no applicable general maritime rule of law.” (VMA ¶ 20 (Dkt. No. 43 at 33).) Admiralty law is in agreement with the parties’ choice of law provision. *See Point Adams Packing Co. v. Astoria Marine Constr. Co.*, 594 F.2d 763, 766 (9th Cir. 1979) (“Contracts for the repair of ships are governed by admiralty law.”).

IV. Analysis

A. Enforceability of the Contract

If the contract is valid and enforceable, the VRRRA’s warranty and limitation of liability provisions may provide Defendants with substantial defenses to Plaintiff’s claims. Plaintiff argues that the Court should not enforce the written, signed VMA and VRRRA agreements because the Defendant’s scope of work was never defined and attached to the VRRRA, contrary to a provision therein stating that:

All plans, designs and specifications for the refurbishment and/or repair work to be

performed by Manager shall be provided by Owner to Manager in advance as Schedules to this agreement. This agreement and attached Schedules shall be dated and executed by both parties before commencement of any work by Manager.

(VRRRA ¶ 1 (Dkt. No. 43 at 37).) Plaintiff argues that the absence of any such Schedules renders the entire contract void as incomplete and ambiguous. (Pl.'s Resp. 12 (Dkt. No. 45).)

The Court disagrees with Plaintiff's argument. The VRRRA language quoted above plainly indicates that it was Plaintiff's responsibility to attach the Schedules to the contract before Defendant Stabbert Maritime Yacht & Ship, Inc. commenced any work. (VRRRA ¶ 1 (Dkt. No. 43 at 19).) It should be noted, however, that Plaintiff signed the VRRRA on two separate occasions, even in the absence of any Schedules. (VRRRA of Jan. 1, 2005 (Dkt. No. 43 at 19–25); VRRRA of Jan. 25, 2005 (Dkt. No. 43 at 37–42).) Plaintiff cannot now avoid its obligations under the contract on the basis of Plaintiff's own failure to supply any Schedules because "[i]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." *Vincaino v. Microsoft Corp.*, 97 F.3d 1187, 1199 (9th Cir. 1996) (quoting *Highlands Plaza, Inc. v. Viking Inv. Corp.*, 435 P.2d 669, 676 (Wash. 1967)).

Plaintiff allowed Stabbert Maritime Yacht & Ship, Inc. to perform for a period of approximately a year and a half despite the absence of Schedules. Basic contract principles state that:

although a party to a contract is generally relieved of his or her own duty of performance if a condition precedent to that performance has not occurred or been performed, that duty can be revived by continuing to receive performance from the other party with knowledge that the condition precedent has not been satisfied. Stated somewhat differently, if a party in default under a contract is allowed to continue to perform, this precludes any right of the other party to rescind the contract or declare a material breach and refuse to further perform because of any known default that has already taken place.

14 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 40:1 (4th ed. 2000) (citing *Longnecker v. Brommer*, 368 P.2d 900 (Wash. 1962)); *see also* Restatement (Second) of Contracts § 246(1) (stating that an obligor's acceptance of the obligee's performance, with knowledge of the nonoccurrence of a condition of the obligor's duty operates as a promise to perform despite the

1 nonoccurrence). Plaintiff cannot now avoid the contract.

2 Moreover, the absence of Schedules does not render the contract hopelessly ambiguous. The
3 VMA (expressly meant to be considered one contract with the VRRRA) states that “[a]ll vessel
4 management services whatsoever provided by Manager to Owner and/or the Vessel during the term of
5 this agreement shall be subject to the terms and conditions of this agreement.” (VMA ¶ 1 (Dkt. No. 43 at
6 27).) This provision indicates that any and all Vessel repair/refurbishment work Stabbert Maritime Yacht
7 & Ship, Inc. managed between November 1, 2004 until April 27, 2006, is covered by the written
8 contract. That would include any hurricane-related repair work Defendant managed.

9 Such a conclusion is supported by Plaintiff’s Amended Complaint, which defines the “Project” as
10 the contract between DOQ and Stabbert Maritime Yacht & Ship, Inc. whereby the company “promised to
11 manage, repair and refurbish the Alucia” and then states that “[t]he Project originally began in Gulfport,
12 Mississippi, but was later transferred to Seattle, Washington.” (Pl.’s Am. Compl. ¶¶ 3.2, 3.6 (Dkt. No. 6
13 at 3–4).) That is to say, Plaintiff’s Complaint shows that Plaintiff considered the agreement to be in place
14 both before and after the hurricane.

15 Moreover, Plaintiff has given several indications that it considered the contract to be in force. For
16 example, the parties officially terminated the contract—both the VMA and VRRRA—on April 27, 2006.
17 (Letter of Understanding Regarding Termination (Dkt. No. 43 at 82).) Had the parties considered the
18 contract not to have been in force, they would have had no need to terminate it. Additionally, Plaintiff
19 sought to recover on breach of contract and breach of warranty theories, and specifically claimed that
20 Defendants breached the bargained-for warranty in the VRRRA regarding repair of defects. (Pl.’s Am.
21 Compl. ¶¶ 4.5 (Dkt. No. 6 at 5).) Further, when asked by Defendants to identify the material contractual
22 breaches at issue, Plaintiff in its discovery responses referred only to the express terms of the VMA and
23 VRRRA. (Pl.’s Response to Interrog. No. 7 (Dkt. No. 43 at 66).) The Court cannot see any legitimate
24 justification for not enforcing the written contract now, both as to the VMA and the VRRRA.

25 However, the contract may bind only those parties who agreed to be bound by it. *See E.E.O.C. v.*
26 ORDER – 6

1 *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“It goes without saying that a contract cannot bind a
2 nonparty.”). Because only one of the Defendant companies is a signatory party to the contract, the
3 following analysis of the contractual defenses applies only to Defendant Stabbert Maritime Yacht & Ship,
4 Inc. The Court will address the remaining Defendants in Part IV.F below.

5 **B. The Warranty Claims**

6 The VRRRA contains a warranty provision that is central to the outcome of this motion, so it will
7 be reproduced here in its entirety:

8 Manager warrants that it will undertake the specific refurbishment/repair work identified
9 on the Schedules attached hereto with due diligence, and that its workmanship and the
10 materials it provides with respect thereto shall be consistent with those offered by
comparable vessel refurbishment/repair contractors.

11 The foregoing warranty applies only to defects in workmanship and/or materials provided
12 directly by Manager, and specifically excludes defects [sic] workmanship, materials, parts
13 and equipment provided by Owner and/or any other contractor or vendor. In addition, the
14 foregoing warranty applies only to defects in workmanship and/or materials provided
15 directly by Manager which are discovered, with written notice having been provided to
16 Manager, within one hundred twenty (120) days of when such workmanship and/or
17 materials was or were provided.

18 Manager’s liability for breach of the foregoing warranty shall be limited to
19 repair/replacement of the defective workmanship and/or materials and to \$50,000 in the
20 aggregate or an amount equal to Manager’s twelve percent (12%) compensation with
21 respect thereto, whichever is less. Any and all such repair/replacement work shall be
22 performed at Manager’s facility by Manager, unless the nature thereof or surrounding
23 circumstances constitute an emergency and require the work to be performed elsewhere
24 and/or by other than Manager; in such an emergency circumstance, if the work is
25 performed elsewhere and/or by other than Manager, it is agreed that Manager shall not be
26 responsible for any costs exceeding those which it would have charged for the work.

THE FOREGOING WARRANTY IS THE EXCLUSIVE WARRANTY GIVEN BY
MANAGER TO OWNER AND IS IN LIEU OF ALL OTHER LEGAL THEORIES,
INCLUDING WITHOUT LIMITATION BREACH OF CONTRACT, NEGLIGENCE,
GROSS NEGLIGENCE, PRODUCTS LIABILITY OR OTHERWISE, AND IS
FURTHER IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED,
INCLUDING WITHOUT LIMITATION ANY WARRANTY OF
MERCHANTABILITY, WARRANTY OF FITNESS FOR A PARTICULAR USE OR
PURPOSE, WARRANTY OF DESIGN OR WARRANTY OF WORKMANLIKE
SERVICE.

(VRRRA ¶ 9 (Dkt. No. 43 at 40–41).) Defendant Stabbert Maritime Yacht & Ship, Inc. claims that the

warranty provides it substantial defenses to Plaintiff's claims. Plaintiff argues that the warranty should not be enforced and urges the Court in any event to adopt Plaintiff's interpretation of the damages limitation. The Court addresses these issues as follows.

1. The Warranty Provision is Enforceable

As a general matter, under Federal Maritime law, "[c]lear precedent holds that, absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced." *Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999) (internal citations omitted). Plaintiff and Defendant Stabbert Maritime Yacht & Ship, Inc., two corporate entities, agreed to be bound by this warranty not just once, but twice—both at the original signing of the VRRRA and VMA agreements on January 1, 2005, and again after the modifications to both agreements were made, on January 25, 2005. There is simply no evidence of overreaching.

Plaintiff argues that the warranty should not be enforced because it is fatally ambiguous, as it refers to Schedules that, as discussed in Part IV.A above, were never attached to the contract. However, the Court finds the warranty language clear and unambiguous even in the absence of Schedules: the warranty covers repair/refurbishment work that Defendant Stabbert Maritime Yacht & Ship, Inc. performed directly and it specifically does not cover work that is performed by vendors. A fact question for trial remains as to how much of the alleged defective work was performed directly by Stabbert Maritime Yacht & Ship, Inc.

Plaintiff urges the Court not to enforce the warranty also because it ostensibly fails of its essential purpose. (Pl.'s Resp. 18–19 (Dkt. No. 45).) Plaintiff points out that pursuant to the VMA, Defendant Stabbert Maritime Yacht & Ship, Inc. was required to enter all contracts with subcontractors in Plaintiff's name. (VMA ¶ 5 (Dkt. No. 43 at 28).) Plaintiff argues that because Defendant Dan Stabbert entered contracts with subcontractors in the names of other Defendant companies, including Ocean Services and Venture Pacific Marine, there is no privity of contract between the subcontractors and Plaintiff such that Plaintiff could sue the subcontractors. Plaintiff argues, in essence, that if it had expected not to be in

1 privity of contract with the subcontractors, it would not have agreed to limit Stabbert Maritime Yacht &
2 Ship, Inc.'s liability.

3 The Court is not convinced by Plaintiff's argument. Plaintiff was not barred from suing Defendant
4 Stabbert Maritime Yacht & Ship, Inc. for breach of its contractual duty to enter into all contracts with
5 vendors in Plaintiff's name. Because Plaintiff could recover damages for such a breach, the warranty did
6 not fail of its essential purpose.

7 **2. Plaintiff Cannot Recover for Defects on Other Legal Theories**

8 The last paragraph of the warranty bars Plaintiff's recovery from Stabbert Maritime Yacht &
9 Ship, Inc. for defective repairs on the bases of breach of contract, negligence, and implied warranties. The
10 warranty expressly states that the warranty "is the exclusive warranty given by Manager to Owner and is
11 in lieu of all other legal theories, including without limitation breach of contract, negligence, . . . and is
12 further in lieu of all other warranties, express or implied." (VRRRA ¶ 9 (Dkt. No. 43 at 41).) Plaintiff thus
13 contracted away any rights to sue Defendant Stabbert Maritime Yacht & Ship, Inc. for defective repair
14 work on theories of breach of contract, negligence, and implied warranties.

15 **3. The Damages Limitation is Ambiguous**

16 For any defective work performed directly by Stabbert Maritime Yacht & Ship, Inc., the express
17 terms of the VRRRA dictate that

18 Manager's liability for breach of the foregoing warranty shall be limited to
19 repair/replacement of the defective workmanship and/or materials and to \$50,000 in the
20 aggregate or an amount equal to Manager's twelve percent (12%) compensation with
respect thereto, whichever is less.

(VRRRA ¶ 9 (Dkt. No. 43 at 40).) The parties disagree as to the meaning of this provision. Plaintiff argues
21 it means that for *each item* of defective work, Plaintiff could recover up to the repair/replacement cost
22 *plus* the lesser of \$50,000 or the Manager's 12% compensation for the work. (Pl.'s Resp. 22 (Dkt. No.
23 45).) Defendant argues that the warranty "clearly limits damages at repair/replacement plus \$50,000 'in
24 the aggregate' or 12%, whichever is less." (Def.'s Reply 6 (Dkt. No. 50); Errata to Reply 2 (Dkt. No.
25

62).) Defendant seems to argue that “in the aggregate” means, in effect, “aggregating all liability for breaches” as opposed to “aggregating the cost of repair and other damages per individual breach.”

A contract “provision is not ambiguous simply because the parties suggest opposing meanings.” *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 883 P.2d 1387, 1393 (Wash. Ct. App. 1994). Rather, it “is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning.” *Id.* The Court does find the provision ambiguous: one plausible reading is that for each item of defective work Defendant performed directly, Plaintiff is entitled to repair or replacement; aggregating all claims for defective work, Plaintiff’s damages are limited to a total of \$50,000 or the Manager’s twelve percent compensation for the defective work, if that amount is less than \$50,000. Another plausible reading is that for each breach of the warranty, Plaintiff is entitled to repair or replacement; aggregating the cost of repair and other damages for each breach, Plaintiff is limited to recovering \$50,000, or the Manager’s twelve percent compensation for the defective work, if that amount is less than \$50,000. Because the Court finds the monetary limitation provision of the VRRRA ambiguous, a fact question remains for trial as to the parties’ intent with regard to its meaning. *See Paradise Orchards Gen. P’ship v. Fearing*, 94 P.3d 372, 377 (Wash. Ct. App. 2004) (“Generally, what the parties intend is a question of fact.”) (internal citation omitted).

C. The Breach of Contract Claims

Though Plaintiff contracted away any right to sue for defective repair work on the basis of breach of contract, Plaintiff may proceed on a breach of contract theory with respect to Stabbert Maritime Yacht & Ship, Inc.’s performance of its other management duties. Pursuant to the express terms of the VMA, Manager Stabbert Maritime Yacht & Ship, Inc. agreed that it “shall at all times exercise the standard of care of a reasonably prudent vessel manager under similar circumstances . . .” (VMA ¶ 4 (Dkt. No. 43 at 28).) One of Defendant Stabbert Maritime Yacht & Ship, Inc.’s enumerated duties under the contract was “procuring and maintaining insurances for the Vessel[.]” (*Id.* ¶ 5.) Plaintiff seeks to recover under a breach of contract theory for Stabbert Maritime Yacht & Ship, Inc.’s alleged failure “to properly

1 administer DOQ's insurance claim." (Pl.'s Am. Compl. ¶ 4.2 (Dkt. No. 6 at 5).) Defendant has not
2 established that Plaintiff's claim for breach of contract on this basis is barred. To the extent that Plaintiff
3 intends to proceed on its claim that "Defendants failed to submit all information, materials, documents,"
4 etc., as required by the contract (*Id.* at ¶ 4.3), such claim also is not barred.

5 **D. The Negligence Claims**

6 Plaintiff's negligence claims as stated in its Amended Complaint stem in large part from the
7 alleged defective repair work. (Pl.'s Am. Compl. ¶¶ 4.10–4.13 (Dkt. No. 6 at 6).) However, pursuant to
8 the express warranty provision of the VRRRA, Plaintiff contracted away its right to sue Stabbert Maritime
9 Yacht & Ship, Inc. for defective work on the basis of negligence. Even if it had not done so, Plaintiff's
10 negligence suit for defective repairs would be barred by the economic loss rule, which, under Admiralty
11 law, disallows negligence claims that are based on economic loss from a product's damage to the product
12 itself. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986) (stating that
13 "damage to the product itself is most naturally understood as a warranty claim"). The Fifth Circuit held
14 that "the economic loss rule adopted in the *East River* case precludes recovery in maritime tort for purely
15 economic loss stemming from the negligent performance of a contract for professional services where
16 those services are rendered as part of the construction of a vessel" and limited plaintiffs "to their
17 contractual remedies against the contract supervisor." *Employers Ins. of Wausau v. Suwannee River Spa*
18 *Lines, Inc.*, 866 F.2d 752, 755 (5th Cir. 1989); *see also Nathaniel Shipping, Inc. v. Gen. Elec. Co., Inc.*,
19 932 F.2d 366, 368 n.3 (5th Cir. 1991) (declining to adopt a distinction between services for the
20 manufacture of a new vessel and services related to the repair of an existing vessel). This Court agrees
21 with the Fifth Circuit's approach.

22 Washington law is also in accord. The "economic loss rule applies to hold parties to their contract
23 remedies when a loss potentially implicates both tort and contract relief." *Alejandre v. Bull*, 153 P.3d
24 864, 867 (Wash. 2007) (explaining that "[w]here economic losses occur, recovery is confined to contract
25 to ensure that the allocation of risk and the determination of potential future liability is based on what the

1 parties bargained for in the contract. . .”). In the instant case, the parties included a standard of care duty
2 in the express terms of the contract, and, as noted above in Part IV.C, Plaintiff may sue Stabbert
3 Maritime Yacht & Ship. Inc. for breach of that contractual duty, except with regard to the alleged
4 defective repairs/refurbishment addressed by the warranty provision.

5 **E. Consequential Damages**

6 The contract provides that “[i]n no event shall Manager be responsible for any incidental, special
7 or consequential damages whatsoever, even if the possibility of such may have been or was foreseeable.”
8 (VRRRA ¶ 10 (Dkt. No. 43 at 41).) It also states that “[n]either party shall be liable for consequential
9 damages, including extra expense, loss of profit, loss of use and/or business interruption damages,
10 whether resulting from breach or default hereof or otherwise, and even if the possibility of such damage
11 was or may have been foreseeable.” (VMA ¶ 16 (Dkt. No. 43 at 33).) The court has already concluded
12 that it will enforce the contract. Accordingly, to the extent that Plaintiff seeks consequential damages,
13 such relief is barred by the express terms of the contract.

14 **F. The Non-Signatory Defendants**

15 The non-signatory, non-assignee Defendants seek dismissal from this action because they are not
16 parties to the contract and thus cannot be liable for its breach. (Def.’s Mot. 11–14 (Dkt. No. 41).)
17 Plaintiff in its Amended Complaint claims that it had “written and oral express and implied contracts”
18 with “Defendants.” (Pl.’s Am. Compl. ¶ 4.2 (Dkt. No. 6 at 5).) However, when asked by Defendants to
19 state the material terms of the contracts at issue, Plaintiff cited only to the VMA and VRRRA as the source
20 of breached contractual obligations. (Pl.’s Response to Interrog. No. 7 (Dkt. No. 43 at 66–68).) The only
21 Defendant that is a signatory to the contract is Stabbert Maritime Yacht & Ship, Inc. The evidence in the
22 record at this stage does not show that Plaintiff had any other contracts with the non-signatory
23 Defendants.

24 The Court, then, turns to the question of whether the non-signatory Defendants can be held liable
25 for the alleged breaches of the VMA and VRRRA.

1 **1. The Purported Assignee**

2 Defendants argue that one non-signatory Defendant, Stabbert Maritime Yacht & Ship, LLC, was
3 also a party to the contract because Stabbert Maritime Yacht & Ship, Inc. assigned the contract to it on
4 January 1, 2006. (Def.'s Mot. 12 (Dkt. No. 41); Assignment (Dkt. No. 43 at 80).) It is unclear to the
5 Court whether the assignment was valid. The VMA states that "neither party may assign this agreement
6 or any portion of its rights or obligations hereunder without the written consent of the other party."
7 (VMA ¶ 19 (Dkt. No. 43 at 33).) The Assignment in the record was not signed by Plaintiff. (Dkt. No. 43
8 at 80.) Moreover, the termination agreement of April 27, 2006 identifies the "Manager" as the original
9 signatory, Stabbert Maritime Yacht & Ship, Inc., rather than the purported assignee, Stabbert Maritime
10 Yacht & Ship, LLC. (Dkt. No. 43 at 82.) Defendant has not carried its burden at this stage of showing
11 that the purported assignee is in privity to the contract.

12 **2. Piercing the Corporate Veil**

13 Plaintiff argues that the Court should disregard the corporate formalities of Defendant companies
14 and find that the non-signatory Defendants are potentially liable on all claims. (Pl.'s Resp. 23 (Dkt. No.
15 45).)

16 "Admiralty courts may pierce the corporate veil in order to reach the 'alter egos' of a corporate
17 defendant." *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1294 (9th Cir. 1997). However, corporate
18 veil piercing is appropriate only "where a corporation uses its alter ego to perpetrate a fraud or where it
19 so dominates and disregards its alter ego's corporate form that the alter ego was actually carrying on the
20 controlling corporation's business instead of its own." *Id.* It is true, as Plaintiff points out, that all
21 Defendant companies are owned by Dan Stabbert. (*See* Stabbert Am. Decl. ¶¶ 1, 2 (Dkt. No. 43 at 2–3).)
22 But "[c]ommon ownership alone is insufficient to support disregard of the corporate form." *Chan*, 123
23 F.3d at 1294.

24 Plaintiff states that it "has uncovered substantial evidence through document discovery that Dan
25 Stabbert exercised complete control over his companies . . . to avoid tax liabilities, liabilities under the

U.S. Longshoremen & Harbor Workers Act, and liability under the VMA and VRRRA.” (Pl.’s Resp. 23 (Dkt. No. 45).) In support of its contentions, Plaintiff submits numerous Declarations and a large number of exhibits. Among them are the following:

(1) An email from Rick Bergfield, a Stabbert employee, to Dan Stabbert and his wife Lindsay Stabbert, discussing the establishment of DeepOcean LLC:

Dan wanted a separate company to hire and pay employees so SMYS was not exposed to injury claims and rate increases on the USL&H. The question becomes whether we want to register and pay taxes on the income we earn in MS or risk being caught and be subject to penalties. Technically the employees that are going to MS from WA are all Stabbert Maritime Management employees and that is a C-Corporation with \$50k taxable income which would prevent Dan from being required to file a tax return as well.

(Hernandez Decl. Ex. L (Dkt. No. 46-7 at 4).) No response from Dan Stabbert is included. Lindsay Stabbert, however, responds, “Thanks Rick!” (*Id.*)

(2) Copies of invoices showing that Stabbert contracted with subcontractors for work on the Vessel in the names of at least two of his non-signatory companies, Ocean Services and Venture Pacific Marine, rather than in the name of Plaintiff or DeepOcean, LLC. (Hernandez Decl. Ex. G (Dkt. No. 46-4 at 16–22); *Id.* Ex. EE (Dkt. No. 46-14 at 3–12).)

(3) Wire transfer notices showing that work done on the Vessel was paid for at least in part through an account in the name of Venture Pacific Marine, one of Stabbert’s non-signatory companies. (Hernandez Decl. Ex. C (Dkt. No. 46-2 at 9–12).)

The Court is not yet convinced that the high standard for veil piercing has been met. However, the Court does find that Plaintiff has at least raised an issue of material fact with regard to whether veil piercing may be appropriate. Therefore, Defendants’ motion to dismiss Ocean Services, LLC; Stabbert Maritime Holdings, LLC; Stabbert Maritime, LLC; Stabbert Yacht & Ship, LLC; and Stabbert Yacht & Ship Holding, LLC is denied.

3. Defendant Dan Stabbert and His Marital Community

Defendants also claim that Dan Stabbert and his marital community are entitled to summary

1 judgment on all claims because Mr. Stabbert was not a party to the contract. (Def.'s Mot. 13–14 (Dkt.
2 No. 41).) Mr. Stabbert signed the VMA and VRRRA in his role as President of the signatory party to the
3 contract, Stabbert Maritime Yacht & Ship, Inc. (Stabbert Am. Decl. ¶ 1 (Dkt. No. 43 at 2).) “In general,
4 a maritime agent acting for a disclosed principal is not liable for claims arising out of contracts executed
5 by the agent on behalf of his principal.” *Atlantic & Gulf Stevedores, Inc. v. Revelle Shipping Agency,*
6 *Inc.*, 750 F.2d 457, 459 (5th Cir. 1985). Further, the VMA expressly states that “[n]o undertaking
7 pursuant to this agreement shall be deemed a personal contract.” (VMA ¶ 15 (Dkt. No. 43 at 33).)

8 Plaintiff argues, however, that the Court should pierce the corporate veil and hold Dan Stabbert
9 and his marital community liable because Mr. Stabbert used his companies and DeepOcean, LLC, to
10 engage in fraud. (Pl.'s Resp. 5 (Dkt. No. 45).) The same veil-piercing analysis above in Part IV.F.2
11 applies here. The Court is not convinced that veil piercing is appropriate so as to reach Dan Stabbert
12 personally. However, the Court does find that Plaintiff has raised at least an issue of material fact as to
13 whether such an outcome is warranted. Therefore, Defendants' motion to dismiss Dan Stabbert and his
14 marital community from this lawsuit at this stage is denied.

15 **G. Defendants' Motion to Strike Portions of Plaintiff's Declarations**

16 Defendant urges the Court to strike numerous portions of the Hernandez Declaration, as well as
17 some portions of the Smith and Kirilloff Declarations. (Def.'s Reply 10 (Dkt. No. 50).) The Court, in its
18 discretion, may strike portions of an affidavit which do not conform to the standards of Rule 56(e)
19 requiring that the affidavit be made on personal knowledge and set forth facts that would be admissible in
20 evidence. FED. R. CIV. P. 56(e).

21 The Court takes no position at this time on the majority of Defendants' motion to strike, since the
22 Court's decisions as explained herein do not rely on most of the material about which Defendants object.
23 Defendants do, however, object to one item that the Court includes in its analysis above: the Hernandez
24 Declaration, paragraph nine. (Def.'s Reply 10 (Dkt. No. 50).) Paragraph nine authenticates Exhibit G,
25 invoices from Offshore-Inland to Ocean Services for work done on the Vessel. Defendants ask the Court

1 to strike it on the basis of hearsay.

2 Hearsay is “a statement, other than one made by the declarant while testifying at the trial or
3 hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c). “In the
4 absence of a procedural rule or statute, hearsay is inadmissible unless it is defined as non-hearsay under
5 federal Rule of Evidence 801(d) or falls within a hearsay exception under Rules 803, 804, or 807.” *Orr v.*
6 *Bank of America*, 285 F.3d 764, 778 (9th Cir. 2002). In this case, the invoices are being used to prove
7 the truth of the matter asserted on the invoices—that Defendants contracted with a vendor in at least one
8 other name besides Plaintiff’s, Ocean Services, Inc. Therefore, it is hearsay. However, for the purposes of
9 summary judgment, “the focus is not on the form of the evidence as it is presented in an affidavit, but
10 rather, whether at trial the matter stated in the affidavit would constitute admissible evidence.” 11 JAMES
11 WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 56.14(1)(d) (3rd ed. 2007) (citing *Hughes v. United*
12 *States*, 953 F.2d 531, 543 (9th Cir. 1992)). In the instant case, Offshore-Inland Services of Alabama, Inc.,
13 the vendor, is a party in the consolidated case and could testify in court as to the truth of the matter
14 asserted on the invoices, i.e., that it contracted with Ocean Services rather than with Plaintiff. Indeed,
15 Brian K. Tomes, the contracts manager for Offshore-Inland, already has sworn as much in an affidavit
16 submitted in support of Plaintiff Offshore-Inland’s Response to Ocean Services’ motion for summary
17 judgment. (Corrected Tomes Decl. ¶¶ 2, 4 (Dkt. No. 78 at 2).) Accordingly, the Court will not strike
18 paragraph nine.

19 **V. Conclusion**

20 For the reasons set forth in this Order, Defendants’ motion is hereby GRANTED IN PART and
21 DENIED IN PART, as follows:

22 (1) Defendants’ motion to dismiss Plaintiff’s breach of contract claim based on deficient
23 repair/refurbishment work (Pl.’s Am. Compl. ¶ 4.2) is GRANTED;

24 (2) Defendants’ motion to dismiss Plaintiff’s breach of contract claim based on Defendants’
25 alleged failure to manage works in compliance with the VMA and relevant marine standards (Pl.’s Am.

1 Compl. ¶ 4.2) is DENIED;

2 (3) Defendants' motion to dismiss Plaintiff's breach of contract claim based on Defendants'
3 alleged failure to administer an insurance claim (Pl.'s Am. Compl. ¶ 4.2) is DENIED;

4 (4) Defendants' motion to dismiss Plaintiff's claims for breach of express warranty (Pl.'s Am.
5 Compl. ¶ 4.4) is GRANTED only to the extent that Plaintiffs seek recovery for defective work performed
6 directly by Defendants. A fact-question for trial remains as to how much of the defective work was
7 performed directly by Defendants as opposed to vendors. An additional fact-question remains as to the
8 parties' intent with regard to the meaning of the ambiguous damages limitation provision.

9 (5) Defendants' motion to dismiss Plaintiff's claims for breach of implied warranty (Pl.'s Am.
10 Compl. ¶ 4.4) is GRANTED;

11 (6) Defendants' motion to dismiss Plaintiff's claims for negligence (Pl.'s Am. Compl. ¶ 4.10–4.14)
12 is GRANTED;

13 (7) Defendants' motion to dismiss Plaintiff's claims for consequential damages is GRANTED;

14 (8) Remaining Defendants' motion for summary judgment on all claims is DENIED.

15 (9) The Court specifically DECLINES to strike paragraph nine of the Declaration of Joaquin
16 Hernandez (Dkt. No. 46 at 4) and takes no position at this time on the balance of Defendants' motion to
17 strike portions of Plaintiff's Declarations.

18
19 SO ORDERED this 2nd day of October, 2007.

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22 

23 JOHN C. COUGHENOUR
24 UNITED STATES DISTRICT JUDGE
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